**Board of Alien Labor Certification**
**United States Department of Labor**
**Washington, D.C.**

DATE: April 27, 1998
CASE NO: 97-INA-448

***In the Matter of:***

KODOS JEWELRY
*Employer*

***On Behalf of:***

TANIEL A. DIARBI
*Alien*

Appearance: Mark L. Gavin, Esq.
Providence, RI
For the Employer and Alien

Before: Holmes, Jarvis, and Vittone
Administrative Law Judges

JOHN C. HOLMES
Administrative Law Judge

## DECISION AND ORDER

The above action arises upon the employer's request for review pursuant to 20 C.F.R. §656.26 (1991) of the denial by the United States Department of Labor Certifying Officer ("CO") of alien labor certification. This application was submitted by employer on behalf of the above-named alien pursuant to §212 (a) (5) of the Immigration and Nationality Act of 1990, 8 U.S.C. §1182 (a) (5) (1990) ("Act"). The certification of aliens for permanent employment is governed by §212 (a) (5) (A) of the Act, 8 U.S.C. §1182 (a) (5) (A), and Title 20, Part 656 of the Code of Federal Regulations ("CFR"). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under §212 (a) (5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and Attorney General that, at the time of application for a visa and admission into the United States and at the

place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and, (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

We base our decision on the record upon which the CO denied certification and employer's request for review, as contained in the Appeal File,[1] and any written argument of the parties. §656.27 (c).

## Statement of the Case

On April 19, 1996, Kodos Jewelry ("employer") filed an application for labor certification to enable Taniel A. Diarbi ("alien") to fill the position of Goldsmith at an hourly wage of $8.50 (AF 27). The job duties are described as follows:

> Design and fabricate gold jewelry, such as rings, brooches [sic], earrings, bracelets and necklaces. Design gold jewelry pieces for custom order or production according to specifications or original ideas. Hand-craft jewelry piece as design prototype by carving objects using abrasives, hand and power tools, and soldering component parts. Fabricate production model for mold maker. Hand carve custom jewelry pieces. Make repairs to gold jewelry pieces.

The job requirements are three years of experience in the job offered. The employer also specified that applicants must have "demonstrated job-related knowledge and ability with 'Oriental' or 'Middle Eastern' jewelry style, production models, soldering and stonesetting" (AF 27).

On February 12, 1997, the CO issued a Notice of Findings proposing to deny the labor certification. The CO found that the employer violated §656.21 (b) (2) (I) (A) (B) which provides that the employer must document that the job opportunity has been and is being described without unduly restrictive job requirements. The job opportunity's requirements, unless adequately documented as arising from business necessity, shall be those normally required for the job in the United States; and be defined in the *Dictionary of Occupational Titles* (*DOT)*. Specifically, the CO objected to the employer's requirement that all candidates possess knowledge and ability with 'Oriental' or 'Middle Eastern' jewelry style, production models, soldering and stonesetting. The CO found that this requirement is a personal preference and tailored to meet the alien's background and qualifications. The CO therefore requested the employer to: (1) delete or alter the requirements and readvertise, or (2) demonstrate that the requirement arises from business necessity (AF 15 ).

In rebuttal, dated March 25, 1997, the employer argued that the requirement arises from business necessity and that 35-40 percent of the jewelry involves "pedigree" jewelry styles such as

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[1] All further references to documents contained in the Appeal File will be noted as "AF."

"Oriental and/or Middle Eastern" design. The employer further stated that its current Goldsmith staff cannot meet the demand for the pedigree style jewelry which has become an important component of the overall business. The employer also listed several retailers and wholesalers where the company's merchandise is sold (AF 11)

The CO issued the Final Determination on April 15, 1997 denying the labor certification. The CO determined that the employer's rebuttal statements did not sufficiently demonstrate that the cited requirement arises out of business necessity. On May 21, 1997, the employer requested review of Denial of Labor Certification pursuant to §656.26 (b) (1) (AF 1).

## Discussion

The issue presented by this appeal is whether the requirement that applicants possess demonstrated knowledge and ability with "Oriental or Middle Eastern" jewelry style is unduly restrictive under §656.21 (b) (2).

Section 656.21 (b) (2) proscribes the use of unduly restrictive job requirements in the recruitment process. The reason unduly restrictive requirements are prohibited is that they have a chilling effect on the number of U.S. workers who may apply for or qualify for the job opportunity. The purpose of §656.21 (b) (2) is to make the job opportunity available to qualified U.S. workers. *Venture International Associates, Ltd.*, 87-INA-569 (Jan. 13, 1989) (*en banc*). A job opportunity has been described without unduly restrictive requirements where the requirements do not exceed those defined for the job in the *DOT* and are normally required for a job in the United States. *Ivy Cheng*, 93-INA-106 (June 28, 1994); *Lebanese Arak Corp.*, 87-INA-683 (Apr. 24, 1989) (*en banc*).

The Board defined how an employer can show business necessity in *Information Industries, Inc.*, 88-INA-82 (Feb. 9, 1989) (*en banc*). The *Information Industries* standard requires the employer to show:

> (1) that the requirement bears a reasonable relationship to the occupation in the context of the employer's business; and
>
> (2) that the requirement is essential to performing, in a reasonable manner, the job duties as described by the employer.

The first prong of the test establishes a link between the job requirement and the employer's business, and the second prong ensures that the job requirement is related to the job duties which the employee must perform. In rebuttal, the employer argued that its restrictive requirement arises from business necessity as 35-40 percent of the jewelry involves pedigree styles such as Oriental or Middle Eastern designs. The employer further stated that its current staff can no longer meet the demand for this type of jewelry. Additionally, the employer submitted a list of nine retail and wholesale jewelers which are clients. We find the employer's rebuttal evidence

unpersuasive and hold that it failed to prove business necessity for the requirement that applicants possess experience with Oriental or Middle Eastern jewelry. This is true because the employer did not provide any probative evidence indicating that the requirement is essential to performing the position -- in a reasonable manner -- the job duties described by the employer. Therefore, the employer failed to meet the second prong of the *Information Industries* test. This conclusion is supported by the fact that the stated job duties make no mention of designing and manufacturing Oriental or Middle Eastern jewelry, but only generally refer to designing, fabricating, and repairing gold jewelry. Consequently, we agree with the CO and find labor certification was properly denied.

## ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

For the Panel:

JOHN C. HOLMES
Administrative Law Judge

**NOTICE FOR PETITION FOR REVIEW:** This Decision and Order will become the final decision of the Secretary of Labor unless, within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except: **(1)** when full Board consideration is necessary to secure or maintain uniformity of its decision; and, **(2)** when the proceeding involves a question of exceptional importance. Petitions for such review must be filed with:

***Chief Docket Clerk***
***Office Of Administrative Law Judges***
***Board of Alien Labor Certification Appeals***
***800 K Street, N.W., Suite 400***
***Washington, D.C. 20001-8002***

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition, the Board may order briefs.